CHOO CHIN THYE

v.

CONCRETE ENGINEERING PRODUCTS BHD & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
ARIFIN ZAKARIA JCA
NIK HASHIM JCA
RAUS SHARIF J
[CIVIL APPEAL NOS: W-02-229-2001, W-02-247-2001 & W-02-265-2001]
22 DECEMBER 2004

CONTRACT: *Formation - Condition - Management agreement conditional upon obtaining approval of government agency within a prescribed time - Such approval not obtained within the prescribed time - Whether contract had lapsed due to effluxion of time*

COMPANY LAW: *Directors - Agency - Actual authority - Ostensible authority*

AGENCY: *Authority of agent - Actual or ostensible authority*

CEPCO's founder and substantial shareholder was one Wong Kong Nam ('Wong'). He held the position of managing director in CEPCO and was aided by a board of directors. The next most senior executive in the company was Ang Yeow Hua ('Ang'). He was in charge of production. On 19 January 1996 one Low Thean Hock ('Low') purchased a substantial shareholding of CEPCO and became a major shareholder of CEPCO. Subsequently, Low installed one Choo Chin Thye ('Choo') as his nominee director in CEPCO. Low also appointed Raja Zainal Abidin ('Raja Zainal') and Dato' Mustaffa Mohd ('Dato Mustaffa') to the board of directors of CEPCO. With the appointment of Raja Zainal and Dato Mustaffa, two of the CEPCO directors had to resign. Wong had to also relinquish his managing directorship in CEPCO. Wong, however, remained as an ordinary director on the board together with two other directors of the former board, namely Tan Sri Amar Stephen Young ('Tan Sri Stephen') and Encik Hamidun Masuod ('Hamidun'). On 24 April 1996 an agreement between Choo and Lim Yong Kiat ('Lim') – the Managing Director of ICP – was purportedly reached for the sale of CEPCO's core business to ICP. On 25 April 1996, on Choo's invitation, Lim and various personnel from ICP moved into the office of CEPCO in Kuala Lumpur and within days had taken

over three of CEPCO's factories and acquired CEPCO'S physical assets and core business located around the country. On 7 May 1996, upon his return from a holiday, Ang was retrenched. On 9 May 1996, a board of director's meeting of CEPCO was called. It was attended by Choo as Chairman, Raja Zainal, Dato' Mustaffa, Tan Sri Stephen and Ang. Also in attendance was one Ms Chui as secretary. What exactly was spoken at the meeting and the resolutions passed were hotly contested between the parties. But all agreed that the principal issue centred on the appointment of ICP to take over the management of CEPCO's core business. On 25 May 1996, a board meeting of CEPCO was called again. Those present were Choo as Chairman, Dato Mustaffa and Hamidun with Ms Chui in attendance as the secretary. At this meeting, the minutes of the board meeting of 9 May 1996 was confirmed and the resignations of Wong and Ang as directors of the company were accepted. On 5 June 1996 Choo executed a management agreement ('the management agreement') for and on behalf of CEPCO with ICP. Lim signed for ICP. By virtue of cl. 2, the management agreement was made conditional upon the approval of the Ministry of Trade and Industry ('MITI'). In the event approval was not obtained within 12 months from the date of the agreement, the agreement was to terminate and be null and void and of no effect whatsoever. However on 2 July 1996, one Dato' Fasir became the controlling shareholder of CEPCO. A board meeting of CEPCO was immediately called on 8 July 1996 and the following resolutions were recorded as passed: (i) the resignation of Choo, Raja Zainal and Dato' Mustaffa as directors of CEPCO; (ii) appointment of Mohd Adib and Dennis Xavier as new directors to the board; (iii) a joint company secretary was added; and (iv) Tan Sri Stephen's version of what transpired at the board meeting held on 9 May 1996 was accepted as the correct version of the proceedings of that day. On 9 July 1996, Hamidun, for CEPCO, wrote informing MITI that the management agreement between ICP and CEPCO was done without the approval of the board of CEPCO. He requested MITI to delay the application for approval of the agreement. At the same time orders were given to the staff of CEPCO to prohibit the representatives of ICP from entering the premises of CEPCO to carry out their management duties. ICP commenced an action seeking *inter alia:* (i) a declaration that the management agreement dated 5 June 1996 was valid and enforceable; (ii) specific performance of the management agreement; (iii) an injunction restraining CEPCO from interfering or obstructing ICP from carrying out the management services. ICP's claim was dismissed by the High Court and ICP appealed. In the Court of Appeal, three main issues fell for determination: (i) whether the management agreement was conditional upon MITI granting approval and did in fact MITI grant such approval; (ii) whether

Choo had actual authority to enter into the management agreement; and (iii) whether specific performance of the management agreement could be ordered. At the trial, ICP adduced evidence to support its argument that both ICP and CEPCO were mistaken to have the clause of obtaining the approval of MITI when in fact the approval of MITI was not necessary. CEPCO's causes of action in the High Court were for fraud, conspiracy, breach of duty and breach of fiduciary duty against Choo, ICP and Lim. CEPCO also appealed against the trial judge's ruling dismissing its claims.

Held (dismissing the appeals)
Per Raus Sharif J delivering the judgment of the Court of Appeal:

[1] In the instant case, both ICP and CEPCO were of the same mind that they needed the approval of MITI for the purpose of ICP taking over the management of CEPCO. Accordingly, provisions were made in the management agreement as in cll. 2.1 and 2.2. Following this, steps were taken by CEPCO to obtain MITI's approval. But no approval was obtained. Having failed to obtain the said approval, and after the condition precedent had not been met, ICP could not turn around and claim that the parties were mistaken when they included cll. 2.1 and 2.2 in the management agreement. Clearly the management agreement was contingent upon the approval of MITI. In this case, no approval had been obtained within the stipulated time. Thus, by effluxion of time, the management agreement had lapsed. (p 337 b-e)

[2] The trial judge's finding of fact that Choo did not have actual authority to execute the management agreement on behalf of CEPCO was based on the testimony of Tan Sri Stephen, the first draft minutes of the board Meeting on 9 May 1996 prepared by Ms Chui, and Tan Sri Stephen's notation in his diary. Tan Sri Stephen's evidence including his letters, the draft minutes and his diary to a great extent confirmed the account of events as revealed by him, Ms Chui and Mr Ang. The trial judge had basically believed Tan Sri Stephen rather than Choo as a witness. There was no reason to disagree with him. The trial judge had not come to a wrong inference from the facts, nor was his decision plainly wrong or unjust so as to justify a review by the Court of Appeal of his findings of the primary facts. The trial judge had carefully analysed the oral testimony and compared it with the contemporaneous documents and arrived at a conclusion that Choo did not have the actual authority to enter into the management agreement. (p 340 e-g)

[3] In view of the fact that the management agreement came to an end by effluxion of time due to the non-fulfillment of the MITI requirement and that Choo had no actual authority to enter into the management agreement, the issue of wilful breach of the management agreement by CEPCO and the entitlement of ICP to specific performance or damages in lieu did not arise. Consequently, ICP's appeal ought to be dismissed. (p 341 a-b)

[4] The trial judge had properly and thoroughly evaluated the evidence and quite correctly found that there was no dishonesty on the part of Lim and hence ICP. The learned trial judge's reasoning on this aspect was not tainted by any lack of judicial appreciation of the evidence placed before him. Nor did he commit any fundamental misdirection or was plainly wrong in his conclusion or inference, to justify the Court of Appeal's intervention. (pp 343 d-h & 344 a)

[5] Clearly on the constructive trust and conspiracy issues, CEPCO in seeking a reversal of the learned trial judge's judgment was challenging the trial judge's findings of facts. It is trite law that only in rare cases that an appellate court would interfere with the primary findings of facts made by the trial court. An appellant, when challenging findings of fact has a heavy burden, which he must discharge if he is to win. In this respect CEPCO failed to discharge this heavy burden. (p 345 d-g)

[6] Choo was an agent of CEPCO. ICP was invited by Choo on behalf of CEPCO to manage CEPCO's core business. Full access to all records was also given to ICP by CEPCO. Clearly, Choo had an apparent or ostensible authority to deal with Lim and ICP. CEPCO should therefore be estopped from claiming that Choo had no such authority. (p 348 e-f)

*[**Bahasa Malaysia** Translation Of Headnotes*

Pengasas dan pemegang saham utama CEPCO adalah seorang Wong Kong Nam ('Wong'). Beliau memegang jawatan sebagai Pengarah Urusan CEPCO dan dibantu oleh satu lembaga pengarah. Pemegang jawatan paling kanan berikutnya di dalam syarikat adalah Ang Yeow Hua ('Ang'). Beliau bertanggungjawab tentang pengeluaran. Pada 19 Januari 1996, seorang Low Thean Hock ('Low') membeli sebahagian besar saham CEPCO dan menjadi pemegang saham utama CEPCO. Berikutnya, Low menamakan Choo Chin Thye ('Choo') sebagai pengarah gantinya dalam CEPCO. Low juga melantik Raja Zainal Abidin ('Raja Zainal') dan Dato' Mustaffa Mohd ('Dato' Mustaffa') ke lembaga pengarah CEPCO. Dengan perlantikan Raja Zainal dan Dato'

Mustaffa, dua orang pengarah sedia ada CEPCO perlu meletak jawatan. Wong juga terpaksa melepaskan jawatannya sebagai pengarah urusan CEPCO. Wong bagaimanapun masih menjadi ahli biasa Lembaga Pengarah bersama-sama dengan dua lagi ahli lembaga pengarah terdahulu, iaitu Tan Sri Amar Stephen Yong ('Tan Sri Stephen') and Encik Hamidun Masuod ('Hamidun'). Pada 24 April 1996 suatu perjanjian di antara Choo dan Lim Yong Kiat ('Lim') – pengarah urusan ICP – telah dibuat bagi menjual perniagaan teras CEPCO kepada ICP. Pada 25 April 1996, atas jemputan Choo, Lim dan beberapa pegawai dari ICP memasuki pejabat CEPCO di Kuala Lumpur dan beberapa hari kemudian telah mengambilalih tiga kilang CEPCO serta aset-aset CEPCO yang lain di seluruh negara. Pada 7 Mei 1996, sekembalinya dari percutian, Ang telah diberhentikan. Pada 9 Mei 1996, suatu mesyuarat Lembaga Pengarah CEPCO telah dipanggil. Ia dihadiri oleh Choo selaku pengerusi, Raja Zainal, Dato' Mustaffa, Tan Sri Stephen dan Ang. Juga hadir Ms Chui sebagai setiausaha. Apa yang diperkatakn dalam mesyuarat tersebut serta apa yang diputuskan di situ menjadi pertikaian hangat pihak-pihak. Tetapi semua bersetuju bahawa isu utama adalah mengenai perlantikan ICP untuk mengambilalih perniagaan teras CEPCO. Pada 25 Mei 1996, satu mesyuarat lembaga pengarah CEPCO kembali diadakan. Yang hadir adalah Choo sebagai pengerusi serta Dato' Mustaffa dan Hamidun dengan Ms Chui sebagai setiausaha. Pada mesyuarat ini, minit-minit mesyuarat Lembaga Pengarah pada 9 Mei 1996 telah disahkan dan perletakan jawatan Wong dan Ang sebagai pengarah syarikat telah diterima. Pada 5 Jun 1996 Choo memeterai perjanjian pengurusan ('perjanjian pengurusan') bagi pihak CEPCO dengan ICP. Lim menandatangani bagi pihak ICP. Fasal 2 perjanjian pengurusan menyatakan bahawa ia adalah tertakluk kepada kelulusan Kementerian Perusahaan dan Industri ('MITI'). Jika kelulusan tidak diperolehi dalam masa dua belas bulan dari tarikh perjanjian, perjanjian akan menjadi terhenti, tidak sah dan batal dan tidak mempunyai apa-apa kesan. Apapun, pada 2 Julai 1996, seorang Dato' Fasir menjadi pemegang saham terutama CEPCO. Suatu mesyuarat lembaga pengarah CEPCO kemudian terus dipanggil, di mana keputusan dan resolusi-resolusi berikut telah dicapai: (i) perletakan jawatan Choo, Raja Zainal dan Dato' Mustaffa sebagai pengarah-pengarah CEPCO; (ii) perlantikan Encik Mohd Adib dan Dennis Xavier sebagai ahli lembaga pengarah baru; dan (iii) versi Tan Sri Stephen tentang apa yang berlaku pada mesyuarat lembaga pengarah pada 9 Mei 1996 diterima sebagai versi sahih prosiding mesyuarat tersebut. Pada 9 Julai 1996, Hamidun, bagi pihak CEPCO, menulis kepada MITI memberitahunya bahawa perjanjian pengurusan di antara ICP dan CEPCO telah dibuat tanpa restu Lembaga Pengarah CEPCO. Sekaligus, beliau meminta supaya MITI menangguhkan kelulusan bagi perjanjian tersebut. Pada masa yang

sama perintah telah dikeluarkan kepada kakitangan CEPCO supaya melarang wakil-wakil ICP dari memasuki premis CEPCO bagi menjalankan tugas pengurusan mereka. ICP memulakan tindakan memohon antara lain: (i) perisytiharan bahawa perjanjian pengurusan bertarikh 5 Jun 1996 adalah sah dan boleh dilaksanakan; (ii) pelaksanaan spesifik perjanjian pengurusan; dan (iii) suatu injunksi melarang CEPCO dari campur tangan atau menghalang ICP dari menjalankan khidmat pengurusannya. Tuntutan ICP telah tolak oleh Mahkamah Tinggi dan ICP merayu. Di Mahkamah Rayuan, tiga isu utama berbangkit untuk keputusan: (i) sama ada perjanjian pengurusan tertakluk kepada kelulusan MITI dan jika begitu sama ada MITI sebenarnya telah memberi kelulusan; (ii) sama ada Choo mempunyai kuasa sebenar untuk memeterai perjanjian pengurusan; dan (iii) sama ada pelaksanaan spesifik perjanjian pengurusan boleh diperintahkan. Di pendengaran, bagi menyokong hujahnya, ICP mengemukakan keterangan bahawa kedua-dua ICP dan CEPCO tersilap dalam mengkehendaki kelulusan MITI kerana kelulusan sedemikian sebenarnya tidaklah perlu. Kausa tindakan CEPCO di Mahkamah Tinggi adalah kerana penipuan, konspirasi, melanggar kewajipan dan melanggar kewajipan fidusiari terhadap Choo, ICP dan Lim. CEPCO juga merayu terhadap keputusan hakim bicara yang menolak tuntutannya.

Diputuskan (menolak rayuan-rayuan)
Oleh Raus Sharif H menyampaikan penghakiman Mahkamah Rayuan:

[1] Dalam kes semasa, kedua-dua ICP dan CEPCO bersependapat bahawa mereka perlu mendapatkan kelulusan MITI bagi maksud pengambilalihan pengurusan CEPCO oleh ICP. Dengan itu, peruntukan mengenainya dibuat di dalam perjanjian pengurusan melalui fasal 2.1 dan 2.2. Dan berikutnya, langkah diambil oleh CEPCO bagi mendapatkan kelulusan MITI. Tetapi tiada kelulusan diperolehi. Setelah gagal mendapatkan kelulusan, dan selepas syarat-syarat baginya tidak dipenuhi, ICP tidak boleh berpaling dan mengatakan bahawa pihak-pihak telah tersilap apabila mereka memasukkan fasal 2.1 dan 2.2 di dalam perjanjian pengurusan. Jelas bahawa perjanjian pengurusan adalah tertakluk kepada kelulusan MITI. Di sini, tiada kelulusan diperolehi dalam tempoh yang ditetapkan. Oleh yang demikian, perjanjian pengurusan telah luput disebabkan luputnya tempoh masa.

[2] Dapatan fakta oleh hakim bicara bahawa Choo tidak mempunyai kuasa sebenar untuk memeterai perjanjian pengurusan bagi pihak CEPCO adalah berdasarkan keterangan Tan Sri Stephen, draf minit mesyuarat lembaga pengarah ynag pertama yang disediakan oleh Ms Chui, dan catatan Tan Sri Stephen pada diarinya. Keterangan-keterangan Tan Sri Stephen seperti

yang terlihat dari surat-suratnya, draf minit mesyuarat serta diarinya, sebahagian besarnya mengesahkan rentetan peristiwa seperti yang didedahlan olehnya, Ms Chui serta En. Ang. Hakim bicara pada dasarnya lebih mempercayai Tan Sri Stephen dari Choo sebagai seorang saksi. Tiada alasan untuk tidak bersetuju dengan dapatan hakim bicara tersebut. Tiada alasan untuk mengatakan bahawa hakim bicara telah membuat inferens yang salah dari fakta atau bahawa beliau telah mencapai keputusan yang nyata salah atau tidak adil bagi menjustifikasikan campur tangan Mahkamah Rayuan terhadap dapatan-dapatan fakta utamanya. Hakim bicara telah secara terperinci menganalisa keterangan lisan dan telah membandingkannya dengan dokumen-dokumen yang ada di hadapannya sebelum mencapai rumusan bahawa Choo tidak mempunyai kuasa sebenar untuk memeterai perjanjian pengurusan.

[3] Oleh kerana perjanjian pengurusan berakhir disebabkan oleh keluputan masa berpunca dari kegagalan untuk memenuhi syarat MITI dan oleh kerana Choo juga tidak mempunyai kuasa sebenar untuk memeterai perjanjian pengurusan, maka isu kemungkiran perjanjian pengurusan oleh CEPCO serta keberhakan ICP kepada pelaksanaan spesifik atau gantirugi tidak berbangkit sama sekali.

[4] Hakim bicara telah menilai keterangan dengan teratur dan teliti dan telah memutuskan dengan betulnya bahawa tidak wujud ketidakjujuran di pihak Lim dan kerana itu ICP. Alasan-alasan hakim bicara berhubung persoalan ini tidak terjejas oleh apa-apa kekurangan penilaian terhadap keterangan yang ada di hadapannya. Beliau juga tidak membuat apa-apa salah arahan yang fundamental, dan tidak membuat kesilapan dalam mencapai konklusi dan inferensnya bagi membolehkan campur tangan Mahkamah Rayuan.

[5] Berkaitan isu konspirasi dan amanah konstruktif, ianya jelas bahawa CEPCO, dalam memohon pengakasan keputusan hakim bicara, sebenarnya mencabar dapatan fakta yang dibuat oleh hakim bicara. Sudah menjadi undang-undang lazim bahawa sebuah mahkamah rayuan akan hanya mengganggu dapatan fakta yang dibuat oleh mahkamah bicara dalam kes-kes yang amat terhad. Seorang perayu, dalam mencabar dapatan fakta, memikul beban yang amat berat untuk dilunaskan. Dalam hubungan ini, beban yang berat tersebut gagal dilunaskan oleh CEPCO.

[6] Choo adalah merupakan agen CEPCO. ICP diminta oleh Choo bagi pihak CEPCO untuk mengurus perniagaan teras CEPCO. CEPCO juga memberikan ICP akses kepada kesemua rekod-rekodnya. Jelas bahawa Choo mempunyai kuasa zahir untuk berurusan dengan Lim dan ICP. CEPCO dengan itu harus dilarang dari menidakkan kuasa Choo yang sedemikian itu.

Case(s) referred to:

Armagas Ltd v. Mundogas SA [1985] 1 Llyods LR 1 ***(refd)***

Chew Hock Sai & Ors v. Connaught Housing Development Sdn Bhd [1985] 1 MLJ 350 ***(refd)***

Freeman & Lachyor v. Buchhurst Park Properties (Management) Ltd & Another [1964] 2 QB 480 ***(refd)***

Sivalingam Periasamy v. Periasamy & Another [1996] 4 CLJ 545 CA ***(refd)***

[Appeal from High Court, Kuala Lumpur; Suit No: S5-22-370-1996]

For ICP - Siew Yew Ming; M/s Raja Eleena Siew Ang & Assoc

For CEPCO - C Abraham (Prasad Abraham & Rishwant Singh with him); M/s Prasad Abraham & Assoc

For Lim Yong Keat - Teh Boon Eng; M/s Teh & Assoc

Reported by Andrew Christopher Simon

JUDGMENT

Raus Sharif J:

Introduction

There are three appeals before this court:

(i) Civil Appeal No. W-02-229-2001;

(ii) Civil Appeal No. W-02-247-2001; and

(iii) Civil Appeal No. W-02-265-2001.

On 3 September 2001, the above three appeals were consolidated and ordered by this court to be carried on as one appeal. The court further ordered that the appeals be heard as Civil Appeal No. W-02-229-2001, and one record of appeal be filed and used for the hearing of all the three appeals. The appeal record for Civil Appeal No. W-02-229-2001 was accordingly filed on 10 May 2001.

On 12 April 2004, Choo Chin Chye, the appellant in Civil Appeal in W-02-229-2001 withdrew his appeal. Thus, the appeals before us are the appeals by Industrial Concrete Products Berhad (ICP) in Civil Appeal No. W-02-247-2001 (ICP's appeal) and Concrete Engineering Products (CEPCO) in Civil Appeal No. W-02-265-2001 (CEPCO's appeal). There is also before us CEPCO's cross appeal to ICP's appeal in Civil Appeal No. W-02-247-2001.

Facts

ICP and CEPCO are both public listed companies. They are direct competitors in the same industry engaging in the business of manufacturers and production of prestressed spun concrete piles and poles. At the material time ICP held approximately 65% market shares of the business. CEPCO held approximately 25% market shares. Hence, combined, ICP and CEPCO held approximately 90% market shares in the manufacture and sale of prestressed spun concrete piles and poles in Malaysia.

CEPCO's founder and substantial shareholder is one Wong Kong Nam (Wong). He held the position of Managing Director in the company and was aided by a Board of Directors. The next most senior executive in the company was Mr. Ang Yeow Hua (Ang). He was in charge of production.

On 19 January 1996 one Low Thean Hock (Low) purchased a substantial shareholding of CEPCO and became a major shareholder of CEPCO. Upon completion of the purchase, Low installed one Choo Chin Thye (Choo) as his nominee director in CEPCO. Low also appointed two other nominees namely: Raja Zainal Abidin (Raja Zainal) and Dato' Mustaffa Mohd (Dato Mustaffa) to the Board of Directors of CEPCO. With the appointment of Raja Zainal and Dato Mustaffa, two of the CEPCO directors had to resign. In addition Wong has to relinquish his managing directorship in CEPCO. Wong, however, remained as an ordinary director on the Board together with two other directors of the former Board that is Tan Sri Amar Stephen Young (Tan Sri Stephen) and Encik Hamidun Masuod (Hamidun).

Sometime in March 1996 Choo met up with the Managing Director of ICP, Lim Yong Kiat (Lim). They discussed Choo's plan to sell CEPCO's core business to ICP. Lim was interested in Choo's business proposition. After consulting ICP's principal shareholder, he started negotiating with Choo. On 24 April 1996 an agreement between Choo and Lim was purportedly reached on a concept paper prepared by Lim. M/s Adnan, Sundra and Low was appointed to prepare the necessary legal documents.

On 25 April 1996, on Choo's invitation, Lim and various personnel from ICP moved into the office of CEPCO in Kuala Lumpur and within days had taken over three of CEPCO's factories and acquired CEPCO'S physical assets and core business located around the country. ICP also cancelled purchase orders given to CEPCO and requested these customers to reissue their orders to ICP.

All these events took place while Ang, the most senior executive of CEPCO, was on holiday abroad. Upon his return on 3 May 1996 he was shocked to find ICP's personnel in CEPCO's office. He also discovered a letter from Choo dated 26 April 1996 addressed to him, informing that ICP had been appointed manager for the production and marketing of CEPCO's core business. On 7 May 1996, Ang received another letter, this time from CEPCO's company secretary (Ms Chui) retrenching him as an employee of the company.

On 9 May 1996, a Board of Director's meeting of CEPCO was called. It was attended by Choo as Chairman, Raja Zainal, Dato' Mustaffa, Tan Sri Stephen and Ang. Also in attendance was Ms. Chui as secretary. What exactly was spoken at the meeting and the resolutions passed were hotly contested between the parties in this case. But all agreed that the principal issue centred on the appointment of ICP to take over the management of CEPCO core business.

On 25 May 1996, a Board meeting of CEPCO was called again. Those present were Choo as Chairman, Dato Mustaffa and Hamidun with Ms. Chui in attendance as the secretary. At this meeting, the minutes of the Board meeting of 9 May 1996 was confirmed and the resignation of Wong and Ang as directors of the company were accepted.

On 5 June 1996 Choo executed a management agreement (the management agreement) for and on behalf of CEPCO with ICP. Lim signed for ICP.

Clause 2 of the management agreement provides that the agreement is conditional upon the approval of the Ministry of Trade and Industry (MITI) and in the event of the approval not being obtained within the period of twelve months from the date thereof or such other date as may be mutually agreed by the parties, the agreement shall terminate and be null and void and of no effect whatsoever.

While all these were going on, Low and associates were unloading their CEPCO shareholdings on the open market. Picking up some of these shares was Dato' Fasir, either in his own name or through nominees. Further on 2 July 1996, Dato' Fasir decided to purchase from Low and associates the latter shareholdings in Progressive. With the purchase of Progressive shares, Dato' Fasir discovered that he had become the controlling shareholder of CEPCO.

A Board meeting of CEPCO was immediately called on 8th July 1996 and the following resolutions were recorded as passed: (i) The resignation of Choo, Raja Zainal and Dato' Mustaffa as directors of CEPCO; (ii) Appointment of Encik Mohd Adib and Dennis Xavier as new directors to the Board; (ii) A joint company secretary was added; and (iii) Tan Sri Stephen's version of what transpired at the Board meeting held on 9 May 1996, was accepted as the correct version of the proceedings of that day.

On 9 July 1996, Hamidun, for CEPCO, wrote to MITI informing that the management agreement between ICP and CEPCO was done without the approval of the Board of CEPCO. He requested MITI to delay the application for approval of the agreement between the parties until the Board of CEPCO has examined the matter in detail.

At the same time orders were given to the staff of CEPCO to prohibit the representatives of ICP from entering the premises of CEPCO to carry out their management duties.

Arising from the above facts, legal actions were then commenced by the parties.

ICP's Case

ICP's case is that it had entered, on 5 June 1996, into a management agreement with CEPCO wherein ICP was appointed as manager of the production division of CEPCO to provide management services for the production of the products subject to the terms and conditions contained therein. According to ICP, from 24 April 1996 to 29th April 1996, at the invitation of CEPCO and pending the signing of the management agreement ICP was allowed to enter CEPCO premises at its headquarters and its factories in Rawang, Batu Gading for the purpose of doing a stock taking and verification exercise of the assets and liabilities. ICP claimed that from 1 May 1996, it had provided management services to CEPCO by taking over the production and marketing of the products.

Thus, the crux of ICP's case is that there has been a breach of the management agreement by CEPCO when on 9 July 1996, three months after they were allowed entry into CEPCO premises, ICP was prevented from entering CEPCO headquarters to supervise the accounts in connection with the provision of management services. According to ICP, the management agreement was again breached, when on 12 July 1996 ICP was prevented from entering the premises of all factories in connection with supervision and management of the operations and, in effect, preventing ICP from providing the management services as stated above.

Relief Sought By ICP In The High Court

In the High Court, ICP sought the following reliefs:

(a) A declaration that the management agreement dated 5 June 1996 is valid and enforceable;

(b) Specific performance of the management agreement;

(c) Damages in lieu of and/or in addition to the specific performance;

(d) An injunction restraining CEPCO from interfering or obstructing ICP from carrying out the management services set out in the management agreement; and

(e) Alternatively, damages for the breach of contract against CEPCO.

CEPCO's Defences And Counter-Claims

CEPCO's defences to ICP's claim are as follows:

(a) That Choo acted without or ostensible authority of CEPCO when he allowed ICP to enter the premises of CEPCO to do a stock take and verification exercise and from 1 May 1996 to provide management services to CEPCO;

(b) That Choo did not have authority (actual or ostensible) to execute the management agreement; and

(c) That the management agreement, being a conditional agreement requiring MITI's approval, has lapsed and become unenforceable since this condition was not fulfilled within the stipulated time.

Hence CEPCO's counter-claim against ICP:

(a) That ICP is liable as constructive trustee and for conspiracy to injure CEPCO; and

(b) That ICP is liable to trespass.

Findings Of The Learned Trial Judge On The Disputes Between ICP And CEPCO

The learned trial judge made the following findings:

(a) That ICP had no actual authority to enter into the management agreement or to execute the same but found that ICP had ostensible authority;

(b) That the management agreement is a conditional agreement;

(c) That it is irrelevant to refer to the terms and conditions of the license granted by MITI to CEPCO to decide whether the management agreement entered into between ICP and CEPCO required such approval from MITI;

(d) That CEPCO was not in wilful breach of the management agreement when refusing to provide any further information that is material to MITI to process the application for the approval as these facts were not raised in ICP's pleadings and therefore ought not to be taken into account; and

(e) That since MITI's approval was not obtained, the condition precedent was not met to give effect to the management agreement and hence, the management agreement had lapsed by effluxion of time.

Issues Raised In ICP's Appeal

Basically there are three main issues raised in ICP's appeal:

(1) Was the management agreement conditional upon MITI granting approval and did MITI grant such approval;

(2) Whether Choo had actual authority to enter into the management agreement; and

(3) Can specific performance of the management agreement be ordered.

Findings

1. Was The Management Agreement Conditional Upon MITI Granting Approval And Did MITI Grant Such Approval

Clause 2 of the management agreement is in the following terms:

> 2. Conditions Precedent and Terms of Agreement.
>
> 2.1. This agreement is conditional upon the approval of the Ministry of International Trade and Industry (MITI) being obtained for the provision of the Management Services by ICP to CEPCO on terms and conditions acceptable to the parties hereto within a period of twelve (12) months from the date hereof or such other date as may be mutually agreed between the parties ("the Cut Off Date").

2.2. In the event that MITI's approval is not obtained on or before the Cut Off Date, then this Agreement shall terminate and be null and void and of no effect whatever and neither party shall have any rights or claim against the other save for antecedent breach.

The crux of ICP's submission before us is that the management agreement is not a conditional agreement, and both ICP and CEPCO were mistaken when they included cl. 2.1 and 2.2 in the management agreement when in fact the approval of MITI to the management agreement is not necessary. It was submitted by ICP that the necessity of the approval by MITI must be related to the condition (j) of the license issued to CEPCO under the Industrial Coordination Act 1975 (ICA 1975) and condition (j) does not include management services and hence consequently, does not require the approval of MITI. Thus, it was submitted by ICP that the learned trial judge was wrong in law and in fact in concluding that it is irrelevant to rely on the terms of the license issued to CEPCO to determine whether the management agreement entered into between the parties require the approval of MITI.

With due respect, while we agree that it is not irrelevant to refer to or rely on the terms of the licence to determine whether the arrangement entered between the parties requires approval from MITI, we are not persuaded to hold that the learned trial judge was wrong to conclude that the condition precedent of the management agreement has not been fulfilled to give effect to the contract and by effluxion of time, the agreement has lapsed. To us the inclusion of cl. 2.1 and 2.2 in the management agreement must be related to condition (j) of the manufacturer licence issued by MITI under the Act. Condition (j) of the licence provides as follows:

Syarikat ini tidak boleh menandatangani sebarang perjanjian terutamanya bagi melaksanakan perusahaan, mendapatkan pengetahuan dan bantuan teknik, perkhidmatan (termasuk pengambilan pegawai dagang), pengurusan pembelian, pemasaran, bayaran royalty, paten dan jenama tanpa mendapat kelulusan bertulis terlebih dahulu daripada Kementerian Perdagangan dan Perindustrian.

The existence of condition (j) must be the reason for the parties to include cl. 2.1 and 2.2 in the management agreement. In fact, steps were taken by Choo to have the condition precedent fulfilled. On 25 June 1996, Choo wrote a letter to MITI requesting the required consent. MITI responded swiftly by a letter dated 5 July 1996 stating that MITI "mengambil maklum" (take note) of the management agreement. Surely, MITI's letter on 5 July 1996, cannot be interpreted to mean the grant of approval. This was made clear in MITI's subsequent letter to CEPCO dated 12 July 1996 where MITI said as follows:

> Ingin dimaklumkan bahawa surat Kementerian bertarikh 5.7.1996 rujukan yang sama **bukanlah** merupakan kelulusan pelaksanaan-pelaksanaan di atas. Pihak Kementerian masih memerlukan permohonan lengkap termasuk kelulusan Ahli-Ahli Lembaga Pengarah mengenai kedudukan syarikat sebelum dan selepas cadangan berkenaan dilaksanakan bagi membolehkan pertimbangan sewajarnya dibuat.

It is clear from the above that MITI did not give its approval. MITI needed further documentation in order to enable it to give consent to the carrying into effect of the management agreement. Since MITI did not get the documents and thus, no approval was ever granted. The management agreement then expired by the passage of time. This was what the learned trial judge found and we agree with him.

At the trial, ICP had adduced evidence to support its argument that both ICP and CEPCO were mistaken to have the clause of obtaining the approval of MITI when in fact the approval of MITI is not necessary. Puan Rosslina of MITI was subpoenaed by ICP. In her evidence she stated that she was the Penolong Pengarah of Unit Saham dan Korporat at the material time and that her duties included *inter alia* the following:

1. to examine and analyse the reorganization scheme of limited companies licensed under ICA 1975;
2. to examine and analyse the reorganization schemes of limited companies licensed under ICA 1971 and those approved by Foreign Investment Committee; and
3. to monitor the status of limited and private companies shares as well as to scrutinize the development of limited companies so as to ensure they fall in line with the aims and objectives of the National Development Policy.

In her evidence, she testified that MITI's approval is required only where an agreement will have an effect on the equity structure of the company and not otherwise. She confirmed ICP's position that the management agreement did not contravene any terms or conditions of the licence issued. She also said that although the letter dated 5 July 1996 signed and sent by her did not say that consent was not necessary, she maintained that consent was not necessary for the management agreement. She further stated that one should not look at the conditions one by one but to look at it as a whole. She also maintained that marketing and management do not and need not come under MITI's purview.

We are of the view that Puan Rosslina's evidence cannot be a determining factor in deciding whether the approval of MITI is necessary or otherwise. In any event if it is true that the approval is not required, why she did not say so in her first letter dated on 5 July 1996. Her assertion is further contradicted by her subsequent letter dated on 12 July 1996 where it categorically stated that 5 July 1996 letter was not an approval as MITI needs further documents from CEPCO. Puan Rosslina, cannot in her oral evidence, contradict the evidence of her own documents prepared and signed by her.

In this case both ICP and CEPCO were fully aware of condition (j) of CEPCO's licence. Both ICP and CEPCO was of the same mind that they needed the approval of MITI for the purpose of ICP taking over the management of CEPCO. Accordingly, provisions were made in the management agreement as in cl. 2.1 and 2.2. Following from the agreement steps were taken by CEPCO to obtain MITI's approval. But no approval was obtained. Having failed to obtain the said approval, and after the condition precedent had not been met, ICP cannot now turn around and claimed that the parties were mistaken when they included cl. 2.1 and 2.2 in the management agreement.

Thus, we agree with the learned judge on this issue. Clearly the management agreement is contingent upon the approval of MITI. But in this case, no approval had been obtained within the stipulated time. Thus, by effluxion of time, the management agreement has lapsed.

2. Whether Choo Had Actual Authority To Enter Into The Management Agreement

It is submitted on behalf of ICP that Choo had actual authority both express and implied to enter into the management agreement on behalf of CEPCO by virtue of the following reasons:

(a) The CEPCO Board of Director's meeting on 9 May 1996 expressly authorized and ratified the entering into the management agreement or at the very least the management of the CEPCO's core business by the ICP from 25 April 1996.

The Board of Directors had also resolved to change the signatories of the CEPCO's bank accounts to accommodate the representatives of the ICP as signatories to the bank accounts of the CEPCO.

(b) In reference to art. 114 of the respondent's Memorandum and Articles of Association, it provides that upon signing of the minutes of the meeting by the Chairman, it shall be conclusive evidence without any proof of the facts therein stated. Not one of the directors of the Board nor did any

senior management staff of the CEPCO objected to the ICP's operations and the management of the factories and the headquarters from 25 April 1996 to July 1996.

(c) The draft minutes of the 29th meeting of the CEPCO's Board of Directors prepared by Chui Lai Leng (DW4) contained amendments and deletions by Choo. The minutes of the same meeting was also prepared by DW4 but without the amendments and deletions. In both versions the following two important resolutions remained intact:

1. the resolution whereby it was resolved that Choo's decision to appoint the ICP as manager to manage the production and marketing of the CEPCO's pile and pole business be and is hereby approved and ratified and that Choo be authorized to proceed with further negotiations with the ICP; and

2. the resolution authorizing the change in signatories to the various banks accounts of the ICP to facilitate the appointment of the ICP as managers of the CEPCO's pile and pole business and also for administrative purposes.

(d) Other than Choo, Dato Mustaffa and Raja Zainal, only Ang and Tan Sri Stephen were present at 9 May 1996 CEPCO's Board of Directors meeting (the other member being Hamidun was absent), and Ang, Tan Sri Stephen and Chui Lai Leng have in their evidence in cross-examination confirmed that Choo took over the same functions of Wong as Managing Director and in fact Choo was de facto Managing Director.

Clearly ICP is relying on 9 May 1996 Board of meeting to support its contention that Choo had the actual authority, to enter the management agreement. According to ICP, 9 May 1996 Board meeting gave Choo the authority. CEPCO contended that the board did not delegate any authority to Choo to execute the management agreement. The learned judge in his examination of what transpired at the Board meeting on 9 May 1996 described it as follows:

> From the oral testimony by the parties concern there is a dispute as to what actually took place at the meeting of 9th May 1996. Tan Sri Stephen and Ang, who were at that meeting, deny the assertions of Choo. Ms Chui, not wanting to get involved, decided to take a neutral stand claiming to a substantial part that, she "could not remember". Faced with such a conflict of oral testimonies one of the means adopted to determine its accuracy is by referring to and relying on contemporaneous acts and deeds of witnesses to draw reasonable inferences. This approach is adopted by Justice Chang Min Tat in *Tindok Besar Estate Sdn. Bhd. v. Tinjar Co*. [1979] 1 LNS 119; [1979] 2 MLJ 229 when he said:

> For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his document and writings. Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity …

In this case such an approach is attractive since soon after the board meeting of 9 May 1996 there were various acts carried out by the parties concerned. Ms Chui had prepared, as she habitually did for all previous Board meetings when she was the company secretary, a draft minutes of the meeting. It recorded a detail account of what took place at the meeting particularly the protestations by Tan Sri Stephen and Ang. Choo erased all these in his signed copy of the minutes. But soon after this meeting Tan Sri Stephen, even without having sight of the minutes signed by Choo, wrote to Ms Chui to remind her to insert his protest in the minutes. Then after Tan Sri Stephen obtained a copy of Choo's watered down executed minutes he wrote to Ms Chui on two occasions to demand that the records be put right. These letters were shown to Choo who gave no instruction for a formal reply except to say that he would speak to Tan Sri Stephen to resolve this matter. Tan Sri Stephen had denied having received any verbal explanation from Choo. By these revelations, I find that the version as contained in Tan Sri Stephen's letter is more probable. His letters are contemporaneous documents to the events and they correspond in material particulars to Ms Chui's draft. Considering the fact that Tan Sri Stephen was an independent director nominated to the board to safe guard the interest of the minority shareholders of CEPCO I find him to be more truthful than Choo who has his own agenda. From the accepted version of what took place at this board meeting there was no dispute that Choo by this time had disclosed to the board that he had to allow ICP to manage the core business of CEPCO. But this does not mean that the board had rectified his act and agreed to the management agreement. It was agreed at the board meeting on 9 May 1996 that a draft management agreement must be forwarded to the board for consideration before approval. With this as the pre-condition how could the board sanction Choo's previous acts and authorize him to execute the management agreement. This pre-condition would also destroy his insistence that the tendering of the management to the board after it was signed a mere formality. Such perception of Choo is entirely without logic and goes against the very essence of the demand by the board to have sight of this document for perusal, consideration and deliberation before approval.

> Choo also relied heavily on the resolution passed on the same day, 9 May 1996, allowing ICP's representatives to be signatories on CEPCO's cheques as an indication that the board had ratified his prior actions and granted him authority to sign the management agreement. On this resolution, Ang has vehemently denied that this item was ever brought up. Tan Sri Stephen seems to indicate that he was hoodwinked into passing such a resolution and if he knew that these signatories were that of ICP's officials he would certainly had objected. I believe Tan Sri Stephen. It would be ludicrous and contrary to Tan Sri Stephen's demand for disclosure of the management agreement before approval by the board and yet agreeing indirectly to allow management to take place first.
>
> Reference is also made by Choo to say that the minutes of the meeting of 9 May 1996 was affirmed by the next board meeting of CEPCO held on 23 May 1996. But with the revelation above, the minutes tendered to this board for confirmation was laced with inaccuracies. Besides no notice was ever sent to Tan Sri Stephen informing him of this gathering. He was in the country at this material time. Under these circumstances I find the confirmation at this meeting of the previous minutes does not support any proposition that relevant approval and sanction was granted to Choo by the board to do what he did.
>
> By my reasoning above, I find that the board had not ratified Choo's acts and did not delegate any authority to Choo to execute the management agreement. Therefore Choo had no actual authority to do what he did.

Clearly, the learned judge found as a fact that Choo did not have actual authority to execute the management agreement on behalf of CEPCO. This finding of fact was based on the testimony of Tan Sri Stephen, the first draft minutes of the Board Meeting on 9 May 1996 prepared by Ms Chui, and Tan Sri Stephen's notation in his diary. Tan Sri Stephen's evidence including his letters, the draft minutes and his diary to a great extent confirmed the account of events as revealed by him, Ms Chui and Mr Ang. Basically the learned trial judge believed Tan Sri Stephen rather than Choo as a witness. We have no reason to disagree with him. Thus, we are unable to agree with the learned counsel for ICP that the learned judge had come to a wrong inference from the facts or his decision was plainly wrong or unjust to justify us to review the findings of the primary facts made by the trial court and to draw our own inferences. To us, the learned trial judge had carefully analysed the oral testimony and compared it with the contemporaneous documents and arrived at a conclusion that Choo did not have the actual authority to enter into the management agreement.

Thus, having agreed with the learned trial judge's findings that:

(1) MITI's requirement remains unfulfilled beyond the period provided for in the management agreement and management agreement came to an end by effluxion of time; and

(2) Choo has no actual authority to enter into the management agreement;

the issue of wilful breach by CEPCO on the management agreement and whether ICP is entitled to remedy of specific performance or damages in lieu as submitted by the document, does not arise. Consequently, ICP's appeal is dismissed.

CEPCO's Appeal

CEPCO's causes of action in the High Court were for fraud, conspiracy, breach of duty and breach of fiduciary duty. These causes of action were pleaded against Choo, ICP and Lim.

CEPCO's causes of action against ICP and Lim specifically, were for:

(i) breach of constructive trust in assisting, facilitating of participating in Choo's breach of fiduciary duty; and

(ii) conspiracy with Choo to injure CEPCO.

The learned trial judge found Choo to have been in breach of his fiduciary duties owed to CEPCO. The learned trial judge held as follows:

> From the above, I find that Choo had not acted bona fide in the interest of CEPCO and neither did he promote and advance CEPCO's interest nor considered the relevant facts before committing the acts as alleged. His entire actions throughout this period as a director was solely towards the benefit and interest of the group that nominated him to the Board. Such interest not only conflicted with those of CEPCO but also was disastrous to CEPCO. Its assets nearly stripped and its core business was on the verge of being annexed by its main competitor. For this, Choo is guilty of being in breach of his fiduciary duty.

Accordingly, the learned trial judge found Choo fully liable to CEPCO on CEPCO's counter-claim against Choo. As stated earlier, Choo had filed an appeal against the learned trial judge's finding. He, however, has withdrawn the appeal. Hence, the learned trial judge's finding on Choo is no longer an issue. What is raised as an issue by CEPCO is the learned trial judge's finding exonerating ICP and Lim from any blame. This is the main complain by CEPCO in its appeal before us.

The learned trial judge dealt at length on the question whether Lim (consequently ICP) was dishonest in his dealing in this transaction. His conclusion is as follows:

> From the evidence adduced in this case, I do not find Lim and consequently ICP (for Lim's actions, deeds and thoughts are attributed to ICP) being dishonest in his dealings in this transaction. Going by the chronology of events, neither Lim nor ICP approached Choo to manage or purchase the core business of CEPCO. The advances came from Tay Way Bok, an agent of Choo and his principal, Repco Low and associates. Hearing from the commercial market and being informed by Tay Way Bok that Repco Low's group had taken over the controlling interest in CEPCO and whose desire was to carry out a reverse takeover of the company, and being supplied with financial status of CEPCO's core business by Tay Way Bok, it is not unusual and unnatural for Lim, who is in the same line of business as CEPCO's, to respond positively to Choo's proposals. Though not doubting that Lim was interested in merging the business of the two companies, CEPCO has accused Lim of not demanding from Choo, during negotiation, Choo's authority to represent CEPCO. Nor did Lim take the trouble to inspect the Memorandum & Articles of Association (M&A) of CEPCO to examine the extent of Choo's authority. To this Lim retorted that it was not polite to make such request nor was it the commercial practice to inspect the M&A of CEPCO since Choo appeared to have apparent authority.
>
> I accept such approach as being the normal in our local social condition. One does not demand from a formidable counter-part whom you have heard from your market information that he had just secured control of a public listed company to have sight of his company's M&A or, for that matter, a board or member's resolution delegating him with such authority during negotiations. It is more convenient and practical to rely on whether his promises made during negotiations can be delivered. On this score, I wish to remind that one must not loose sight of the fact that commercial people are not lawyers. Lawyers are well verse in the law and whose discipline is to be on a constant look out for every eventuality. A business's normal approach is that: If you have the goods to sell, please show them to me, and if it suits my purpose with the right price I shall purchase them, unless there are circumstances which arose my suspicion that you have obtained the goods by unlawful means. In this case Choo was able to deliver all his undertakings, principally to lead, without any opposition, Lim and his team of ICP's personnel into the premises of CEPCO's core business and to permit them to operate without interference. There was no untoward incidence to warrant any suspicion that what Choo did was in breach of this fiduciary duty. Though Lim was informed by Choo that there was "fireworks" at the board meeting of CEPCO on 9th May 1996 but I do not think that this should create or arose any suspicion that Choo had committed a breach of this fiduciary duty. Aggressive board meeting is not uncommon in a company that had just undergone a change and whose management of the core business would be affected. But in this case, despite of the "fireworks" Choo was able to secure for ICP's representatives to be signatories of CEPCO's

cheques. Though as I have ruled that certain board members were hoodwinked into this, but Lim and ICP, the outsiders, this does not reflect a breach of fiduciary duty on Choo's part. In fact it even enhanced Choo's image that he has power delegated to him by the board to transact this deal with ICP.

Another area which CEPCO feels that Lim and ICP should have investigated on the authority of Choo is that this deal involved the sale of substantial assets of CEPCO which required member's approval under s. 132C of the Companies Act. But, as comprehensively discussed, at this stage, where only the management of CEPCO's core business was involved such approval was not necessary. Such approval is only required when the assets are purchased by ICP, and this is accommodated in the draft sale and purchase agreement attached to the letter of intent.

Based on the above and keeping in mind that honesty is an objective standard with subjective elements, I find that Lim, and consequently ICP, was not dishonest and, as such, had not committed any breach of constructive trust accused. For this, CEPCO's claim against both Lim and ICP on this cause of action must fail.

We are of the view that the learned trial judge had properly and thoroughly evaluated the evidence and quite correctly found that there was no dishonesty on the part of Lim and hence ICP. The learned trial judge had reviewed and considered:

(a) the chronology of events;

(b) that Lim did not appear to manage or purchase CEPCO's core business;

(c) Lim was supplied by Choo's agent with CEPCO's financial data;

(d) Lim's explanation and reason for not demanding to look at the Memorandum and Articles of Association of CEPCO to determine the extent of Choo's authority during negotiations;

(e) the effect of Choo able to deliver all his undertakings, namely, to allow Lim and ICP's personnel to enter CEPCO's premises and to operate CEPCO's business without interference;

(f) the effect of there being "fireworks" at the Board Meeting of CEPCO held on 9th May 1966; and

(g) the fact that notwithstanding such "fireworks" Choo was able to secure ICP's representatives to be signatories to CEPCO's Board Resolution dated 9 May 1996.

To us the learned trial judge's reasoning on this aspect of the appeal is not tainted by any lack of judicial appreciation of the evidence placed before him or committed any fundamental misdirection or plainly wrong in his conclusion or inference, to justify this Court's intervention. Accordingly, we uphold the learned trial judge's findings.

The learned trial judge also did not find in favour of CEPCO on the issue of conspiracy between Lim and ICP with Choo, against CEPCO. The learned trial judge found for a fact that there was no such intention existing between Lim and ICP nor was there any intention between them and Choo to effect an unlawful purpose. There was a further finding that both Lim and ICP entered into this transaction as a business venture which they felt was advantageous and beneficial to their own commercial concern and this was entirely acceptable as they were then of commercial concern.

We are in agreement with the learned trial judge. Further argument by CEPCO that the learned trial judge has erred when he failed to draw the necessary inferences that:

(i) there was a common intention shared by Choo and Lim to strip and sell CEPCO's assets without the approval of its members and the Board and to cripple CEPCO's marketing department;

(ii) the unlawful purpose/unlawful act by unlawful means of Choo was not shared by ICP/Lim; and

(iii) there was a conspiracy between ICP/Lim and Choo to injure CEPCO, and CEPCO did in fact suffer injury,

had been dealt with correctly by the learned trial judge.

In relation to the "strip and sell, without members' approval" point, the learned trial judge held as follows:

> It was subjected to the approval of the relevant bodies. The Letter of Intent was accompanied with a draft sale and purchase agreement which contain terms requiring consent and approval of CEPCO's members.
>
> As for the management agreement, this only permits ICP to manage the core business of CEPCO. And the implementation letter allows ICP to enter and manage the core business prior to the consent from MITI as is provided for under the management agreement. From the effective documents (as distinguished from those aborted), I find no intention of the parties to by-pass the members of CEPCO as regards to the sale of CEPCO's assets.

As to the crippling of CEPCO's marketing department the learned trial judge held as follows:

> Then in the course of management, to economise, synergies and the cost effective and competitive, and perusal of CEPCO's core business documents, the reduction of a duplicate marketing force, as well as channeling some of CEPCO's orders to ICP are totally acceptable commercial approach.

In regard to the unlawful purpose/unlawful act common intention point, this was dealt with by the learned trial judge as follows:

> I find there exist no common intention between Lim and ICP on the one hand with Choo to effect any unlawful purpose or to do a lawful act by unlawful means resulting in injuries to CEPCO, Choo did possess an unlawful purpose and/or did a lawful by unlawful means, but this was not shared by Lim or ICP. They (Lim and ICP) entered into this transaction primarily as a business venture which they felt was advantageous and beneficial to their own commercial concern. This is entirely acceptable since they are men of commerce.

We agree wholeheartedly with the conclusion of the learned trial judge. Clearly on both issues, namely constructive trust and conspiracy, CEPCO in seeking a reversal of the learned trial judge's judgment is challenging the learned trial judge's findings of facts. It is trite law that only in rare cases that an appellate court would interfere with the primary findings of facts made by the trial court. The law is very clear, that an appellant, when challenging finding of fact have a heavy burden, which he must discharge if he is to win. In this respect CEPCO has failed to discharge this heavy burden. In *Sivlingam Periasamy v. Periasamy & Another* [1996] 4 CLJ 545, the Court of Appeal said:

> It is trite law that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to interfere in a case when as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

We cannot say on the facts of this case that the learned trial judge had so fundamentally misdirected himself.

The next main issue raised by CEPCO in this appeal is on the finding of the learned trial judge who, after having decided that Choo had no actual authority, found that Choo did have apparent or ostensible authority to bind CEPCO. It is the submission of CEPCO that the learned trial judge erred in this regard. The learned counsel for CEPCO referred to a number of cases to demonstrate that a contractor/third party cannot and will not be permitted by a court of

law to rely on an agent's own expression of authority. In particular the learned counsel referred us to the Federal Court case of *Chew Hock Sai & Ors. v. Connaught Housing Development Sdn. Bhd.* [1985] 1 MLJ 350, which stated:

> Now the difference between actual and apparent or ostensible authority and the principles applicable thereto are adequately explained by Diplock LJ in *Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd.* from page 502 to 504 as follows:
>
> > It is necessary at the outset to distinguish between 'actual authority' of an agent on the one hand, and an 'apparent' or 'ostensible' authority on the other. Actual and apparent authority are quite independent of one another. Generally, they do exist and coincide, but either may exist without the other and their respective scopes may be different. As I shall endeavour to show, it is upon the apparent authority of the agent that the contractor normally relies in the ordinary course of business when entering into contracts.
> >
> > An 'actual' authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are parties. Its scope is to be ascertained applying ordinary principles of construction of contracts including any proper implications from the express words used, the usage of trade, or the course of business between the parties. To this agreement the contract is a stranger; he may be totally ignorant of the existence of any authority on the part of the agent. Nevertheless, if the agent does not enter into a contract pursuant to the 'actual' authority, it does not create contractual rights and liabilities between the principal and the contractor …
> >
> > An 'apparent' or 'ostensible' authority, on the other hand, is a legal relationship between the principal and the contractor created by representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority so as to render the principal liable …

Further learned counsel quoted the following excerpt from *Armagas Ltd. v. Mundogas SA* [1985] 1 Llyods LR 1 regarding the principles applicable to ostensible or apparent authority:

> Stephenson LJ held:
>
> Knowing that they should have referred to the defendants' top management for confirmation of Magelssen's representation that he had their authority and should not have relied on his representation … they took the risk of Magelssen's representation of authority being untrue and cannot hold the defendants responsible for his fraudulent misrepresentation either in contract or in tort.

Mr. Siew Yew Ming for ICP contended that Choo had ostensible and apparent authority to act on behalf of CEPCO. He referred to the principle in *Freeman & Lachyor v. Buchhurst Park Properties (Management) Ltd & Another* [1964] 2 QB 480 which laid down the conditions, which must be fulfilled to entitle a contractor to enforce against a company, a contract entered into on behalf of the company by an agent who had no actual authority to do so. He contended that all the conditions have been satisfied and that Choo had ostensible or apparent authority to make a contract on behalf of CEPCO.

The learned trial judge, in his judgment referred to the conditions as laid down by Lord Diplock in *Freeman*'s case. These conditions are:

(1) That a representation that the agent had the authority to enter on behalf of the company with a contract of the kind sought to be enforced was made to the contractor;

(2) That such representation was made by a person or persons who had actual authority to manage the business of the company either generally or in respect of those matters to which the contract relates;

(3) That he (the contractor) by such representation to enter into the contract, that is, that he in fact relied on it; and

(4) That under its memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent.

The learned trial judge then applied the facts of the case to the four tests and made the following findings:

> The representation, that Choo has authority to enter into the management agreement, in this case comes mainly from the acts and deeds of Choo himself. He had represented to ICP that he has mandate to represent CEPCO on this matter. Besides this, the acts and deeds of CEPCO's staff and the board itself also contributed to such representation. The following are instances in support:
>
> Choo was appointed to the board of directors of CEPCO in the early part of 1996. As revealed, he was not conferred with any exclusive powers. He was only an ordinary director of company. However, giving the impression that he represents the controlling shareholders of the CEPCO, the staff and the directors of the company were in deference to him. They referred to him for major decisions relating to the company's affairs. This included Ang, the then most senior executive of the company as well as a director. Besides being a mandatory signatory of the company's cheques, Choo also chaired all the board

meetings of this period. These, in my opinion, made him a *de facto* executive chairman of CEPCO. Then on 25th April 1996, after agreeing to the terms as set out in Lim's concept paper and giving instructions to the lawyers to prepare the necessary legal documents, Choo accompanied ICP's representatives into CEPCO's headquarters in Kuala Lumpur and allowed ICP to take over the running of CEPCO's core business. Contemporaneous with this act was a letter of instructions by Choo to Ang requiring Ang and all the staff of CEPCO to render full cooperation to ICP to carry out its management activities in CEPCO. This was complied with as reflected by the ability of ICP to carry out their management exercise without any resistance from directors, staff or shareholders of CEPCO. Not long thereafter, Choo signed several letters of dismissal of CEPCO's key staff at the instigation of ICP. Ang also received his letter of dismissal as an employee of CEPCO's key staff at the instigation of ICP. Ang also received his letter of dismissal as an employee of CEPCO; a letter signed by Ms Chui on the instruction of Choo. After the Board meeting of 9th May 1996 more display of authority by Choo was seen. Choo was able to secure ICP's personnel to be signatories to CEPCO's cheques. To achieve this, approval of the board of CEPCO must have been obtained, reflecting that the board had consented to Choo's action in allowing ICP to manage CEPCO's core business.

Having fulfilled all the four conditions set out in the tests, I have to return a finding that Choo had apparent or ostensible (including implied) authority from CEPCO to enter into the management agreement.

We agree with the findings of the learned trial judge. Choo was an agent of CEPCO. ICP was invited by Choo on behalf of CEPCO to manage CEPCO's core business. Full access to all records were also given to ICP by CEPCO. Clearly, to us Choo had an apparent or ostensible authority to deal with Lim and ICP and CEPCO is therefore estopped from claiming that Choo had no such authority.

Since Choo had the apparent or ostensible authority to permit ICP to manage CEPCO's business and for that purpose Lim and various personnel from ICP were allowed to move into the office and factories of CEPCO, the issue of trespass by ICP is a non-issue. Accordingly, we agree with the learned trial judge's decision in dismissing CEPCO's action against ICP and Lim. CEPCO'S appeal against ICP and Lim is therefore dismissed.

Conclusion

In summary our decisions are as follows:

(i) ICP's appeal in W-02-247-2001 is dismissed with costs. The deposit to be paid to CEPCO towards account of taxed costs.

(ii) CEPCO's cross appeal in W-02-247-2001 is dismissed with costs.

(iii) CEPCO's appeal in W-02-265-2001 against Lim and ICP is dismissed with costs. The deposit to be paid to Lim and ICP towards account of taxed costs.